BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER TROYER	)	
Claimant	)	
	)	
VS.	)	
	)	
TNT CUSTOM METAL FABRICATORS	)	
Respondent	)	Docket No. 1,041,297
	)	
AND	)	
	)	
KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the October 21, 2008 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes (ALJ).

ISSUES

The ALJ concluded that the attack against claimant by his co-worker "was a personal matter and was not related to claimant's employment."[1] Thus, she concluded that claimant's injuries did not arise out of and in the course of his employment and his request for temporary total disability benefits and payment medical bills was denied.[2]

Claimant has appealed this Order and contends there was a sufficient nexus between his work and the assault to conclude that the assault arose out of his employment. Accordingly, claimant requests the Board reverse the ALJ's Order and find the assault compensable.

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[1] ALJ Order (Oct. 21, 2008) at 1.

[2] *Id.* at 2.

Respondent maintains the Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Respondent is a metal fabricator that creates metal staircases. Claimant was employed as a laborer assigned to grind, weld and clean up during the process. On July 24, 2008 he was working with another employee and the two took a lunch break about 11:30 am.

During lunch the two began a verbal exchange that, while friendly, involved what some would view as vulgarity. At no time did either of the two become angry. Lunch ended and the two returned to work without incident. At approximately 12:50 pm the co-worker left the work area only to return about 10 minutes later. Claimant continued working while he was gone but once the co-worker returned, there was another verbal exchange between the two. The co-worker asked claimant if he intended to keep working or merely stand around. Claimant perceived this as more light-hearted teasing and he stated that he would just keep standing there until he found something else to do.

The co-worker began working again, welding more pieces and the two worked without incident for about 30 minutes. At that point claimant went to another area of the shop to address a problem with some of his earlier work product. This required him to talk to a man named Brian. While talking to Brian, claimant was struck from behind by the co-worker. Claimant turned to look at the co-worker then walked to the office to talk to a supervisor.

The supervisor immediately conducted an investigation and both claimant and the co-worker confirm the recitation of the facts set forth above. There is no explanation for why the co-worker decided to strike claimant other than claimant's later understanding that the co-worker did not appreciate being called a "bitch".[3]

Claimant suffered a broken jaw in this assault and as a result, had to undergo surgery to wire the jaw shut in order to allow the bone to heal. He was off work for a period of time and has incurred medical bills in connection with this injury.

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the

[3] P.H. Trans. at 39.

burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

In this appeal, the threshold question is whether, under the facts and circumstances of this case, the injuries sustained by the claimant at work from an assault by a co-worker and his accomplice are compensable. Put another way, did the fight "arise out of" claimant's employment. Fights between co-workers usually do not arise out of employment and generally will not be found compensable.[7] If an employee is injured in a dispute with another employee over the conditions and incidents of the employment, then the injuries are compensable.[8] For an assault stemming from a purely personal matter to be compensable, the injured worker must prove either the injuries sustained were exacerbated

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[4] K.S.A. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995).

[6] *Id.*

[7] *Addington v. Hall*, 160 Kan. 268, 160 P.2d 649 (1945).

[8] See *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 506-507, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

by an employment hazard,[9] or the employer had reason to anticipate that injury would result if the co-workers continued to work together.[10]

Here, the ALJ concluded that the assault stemmed from a personal matter and had no causal relationship to the workplace. After a complete review of the record, this Board Member concludes the ALJ's finding that the assault arose out of a personal dispute rather than any work-related issue should be affirmed. There is simply no evidence within this record that would suggest that work had anything to do with this assault. Claimant and this co-worker exchanged words over lunch and apparently unbeknownst to claimant the co-worker left this conversation angry. The record does not contain even the slightest suggestion that anything in the work place - other than claimant - had any bearing on his anger. Based on this record, this Board Member finds the ALJ's Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[11] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 21, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2008.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

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[9] *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

[10] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

[11] K.S.A. 44-534a.